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SUPREME COURT, U.S.

No. 07-440

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the decision below, the Fifth Circuit held that petitioner's Sixth Amendment right to counsel did not attach, even after he was arrested, brought before a judge who found probable cause that he had committed a crime, and bound over by that judge to custody, simply because prosecutors were not involved in the initial court appearance. The petition for a writ of certiorari demonstrated that the Fifth Circuit's decision conflicts with the holdings of other federal courts of appeals and state courts of last resort; reflects a fundamental confusion regarding the meaning of this Court's Sixth Amendment jurisprudence; and permits indigent defendants to be incarcerated for long periods without access to counsel. The result in this case was that petitioner—who was legally incapable of committing the crime of which he was accused—was jailed for weeks, unable to free himself, until his belatedly appointed lawyer proved his innocence.

Gillespie County does not defend the Fifth Circuit's prosecutorial involvement test or attempt to demonstrate that it is consistent with the analysis employed by this Court or other courts. Rather, its principal response is that the Fifth Circuit's decision does not conflict with the other decisions discussed in the petition because, unlike the defendants in those cases, Rothgery was not "arraigned" at his initial court appearance. That contention misapprehends basic Sixth Amendment law, under which the question when adversary judicial proceedings commence turns on the *substance* of the proceedings at issue, not the particular label state law attaches to them. It also misrepresents the relevant cases, which addressed proceedings functionally identical to those here and reveal a clear and entrenched split of authority.[1] Because the Fifth Circuit's decision cannot be

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[1] Gillespie County's suggestion (Opp. 3-4, 10, 15) that Rothgery "waived his right to counsel" is both meritless and irrelevant, as neither court below made any such finding. Rothgery waived only his right to have counsel present at the initial appearance itself, as the magistrate noted by underlining the words "at this time" on the form (Pet. App. 36a; *see* Pet. 9), and he submitted a written request for the appointment of counsel shortly after his initial appearance, followed by additional written and oral requests.

reconciled with the holdings of other courts of appeals and state supreme courts, reveals significant confusion as to the proper application of this Court's Sixth Amendment holdings, and poses a significant threat to the values underlying the Sixth Amendment, this Court should grant certiorari.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

Gillespie County does not dispute that the Fifth Circuit's "prosecutorial involvement" test conflicts with the analysis employed by other courts of appeals and state supreme courts. Instead, it contends that the outcome in this case can be reconciled on its facts with the decisions by other courts discussed in the petition because those cases involved an "arraignment," rather than an "initial appearance" like that in Rothgery's case. The Fifth Circuit itself did not rely on that distinction, which is meritless.

As an initial matter, this Court has made clear—and the Fifth Circuit itself recognized below—that it is not the state-law label attached to a proceeding, but its functional significance, that determines whether it marks the commencement of adversary judicial proceedings. *See Kirby* v. *Illinois*, 406 U.S. 602, 609 (1972) (Sixth Amendment right attaches whenever

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See Patterson v. *Illinois*, 487 U.S. 285, 293 n.5 (1988) ("petitioner's waiver was binding on him *only* so long as he wished it to be"). Both the district court and the Fifth Circuit assumed the truth of those facts—as to which there was in any event no genuine dispute—for purposes of ruling on Gillespie County's summary judgment motion. Pet. App. 3a-5a, 14a-17a & n.1.

Also meritless and irrelevant is Gillespie County's passing contention (Opp. 4, 16) that Rothgery failed to prove a policy sufficient to establish liability under *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Neither court below reached that issue, ruling only that adversary judicial proceedings had not commenced. Pet. App. 2a, 12a, 19a & n.7. In any event, the summary judgment record included uncontested deposition testimony from the Gillespie County Judge—the presiding officer of the county's commissioners court, responsible for indigent defense policy in the county, *see* Tex. Const. art. V, § 18(b)—of a policy of denying appointed counsel to indigent defendants released on bond until after indictment or information. *See* 4 R 537-542, 594, 598 (district court record).

adversary judicial proceedings commence, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); Pet. App. 5a; *see also* Br. *Amici Curiae* Twenty-Two Professors of Law 5-6. Nearly every state provides for an initial court appearance of the kind that occurred here, at which a defendant is informed of the charges against him and committed to custody or bail. Such an appearance may be termed a "first appearance," a "preliminary appearance," an "initial presentment," a "preliminary arraignment," an "arraignment on the warrant," or some other label. LaFave et al., 1 *Criminal Procedure* § 1.3(k), at 113 (2d ed. 1999). As the petition explained, most courts—with some exceptions—have held that such an initial appearance initiates adversary judicial proceedings. *See, e.g., Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) ("Although adversary judicial proceedings may commence in a number of ways, ... the [U.S. Supreme] Court and commentators are in agreement that such proceedings clearly have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment'"); Pet. 7 n.2. The Fifth Circuit's decision places it firmly in the minority camp.

Moreover, to the extent Gillespie County contends that the cases discussed in the petition involved proceedings that were functionally different than Rothgery's initial appearance, it is mistaken. It attempts to argue, for example, that in certain of those cases the defendant, unlike Rothgery, was required to enter a plea at his court appearance. But Gillespie County uniformly misrepresents the decisions it attempts to distinguish. Those decisions rest on facts functionally identical to those here and are in square conflict with the Fifth Circuit's holding below.

A. The Fifth Circuit's Decision Conflicts With The Decisions Of The Third, Sixth, And Eleventh Circuits

Gillespie County first asserts (Opp. 11) that under Ohio law, the initial appearance at issue in *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001), was "an arraignment wherein the defendant must plead to the charges and request a trial by jury or

face waiver of that right," and thus distinguishable from Rothgery's initial appearance. That is incorrect. Rule 5(A) of the Ohio Rules of Criminal Procedure—cited by the Sixth Circuit as the law governing Mitzel's initial appearance, *see* 267 F.3d at 532—provides that "[i]n felony cases," such as Mitzel's, "the defendant *shall not be called upon to plead* ... at the initial appearance," and further provides that the "necessity to make demand" for a jury trial applies only "in petty offense cases." Ohio R. Crim. P. 5(A) (emphasis added); *cf id.* ("In *misdemeanor cases* the defendant may be called upon to plead at the initial appearance.") (emphasis added).[2] The sequence of events in *Mitzel* was precisely the same as here: Mitzel "had been placed under arrest, the police had issued a complaint against him detailing the essential facts of the offense with which he was charged," "he had appeared before a state judge" at an "initial appearance," and "the court ordered that his confinement in jail continue." 267 F.3d at 532. But while the Sixth Circuit held that "[t]here can be no doubt ... that judicial proceedings had been initiated," *id.* (citation and internal quotation marks omitted) (brackets and ellipsis in *Mitzel*), and that the Sixth Amendment right to counsel had therefore attached, the Fifth Circuit held just the opposite.

Similarly, Gillespie County contends (Opp. 13) that the defendant in *Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (en banc), had been "arraigned." But the "arraignment" held to trigger the Sixth Amendment right to counsel in *Matteo* was a "*preliminary* arraignment," at which Matteo was committed to jail following arrest. *Id.* at 893 (emphasis added). This preliminary arraignment was held well before the "district attorney filed an information" and Matteo's "arraignment [on the information] was held."

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[2] Gillespie County's reliance on *State* v. *Garris*, 713 N.E.2d 1135 (Ohio Ct. App. 1998), is misplaced. Interpreting Ohio R. Crim. P. 5(A), *Garris* held that the defendant did *not* waive the right to a jury trial by failing to request one at his initial appearance, since he was charged with a "serious offense" (carrying possible incarceration of more than six months) rather than a "petty offense." *Id.* at 1138-1139 (reversing conviction obtained without a jury).

Id. at 892. In substance, then, the "preliminary arraignment" in *Matteo* was precisely the same as the "arraignment on the warrant" at issue in *Brewer* and *Jackson*, or the "initial appearance" in Rothgery's case. *See* Pet. 6 n.1.[3]

Finally, Gillespie County claims (Opp. 13-14) that *Fleming* v. *Kemp*, 837 F.2d 940 (11th Cir. 1988), involved an "arraignment" under Georgia law, at which the defendant may waive rights and plead guilty. In fact, contrary to Gillespie County's representation, the Eleventh Circuit observed that a "formal arraignment had *not* occurred," but nevertheless held that the right to counsel had attached when the defendant had been arrested, brought before a justice of the peace, informed of his rights and the charges against him, and committed to jail—precisely the same sequence of events as in Rothgery's case. *Id.* at 947-948 (emphasis added). Nothing in *Fleming* indicates that the defendant could waive his rights or plead guilty at his initial appearance, and the sole authority Gillespie County cites to that effect stands for precisely the opposite proposition, stating that the judicial officer at the "initial appearance hearing" there "had *no* authority" under Georgia law to "take a guilty plea." *State* v. *Simmons*, 390 S.E.2d 43, 45 (Ga. 1990) (emphasis added). In sum, Gillespie County's effort to reconcile the Fifth Circuit's decision with those of the Third, Sixth, and Eleventh Circuits fails. The law in those circuits is in stark conflict and will remain so unless this Court intervenes.

B. The Fifth Circuit's Decision Conflicts With The Decisions Of State Courts Of Last Resort

Gillespie County similarly seeks to distinguish *O'Kelley* v. *State*, 604 S.E.2d 509 (Ga. 2004), as a case at which the defendant was "arraign[ed]" (Opp. 14), but the proceeding in *O'Kelley* was again functionally indistinguishable from that in Rothgery's case. O'Kelley was arrested; "taken before a mag-

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[3] Pennsylvania law confirms that Matteo's preliminary arraignment was functionally identical to Rothgery's initial appearance. *See* Pa. R. Crim. P. 540 (at a "preliminary arraignment," the court "shall not question the defendant about the offense(s) charged but shall read the complaint to the defendant," inform him of his rights, and set bail or commit the defendant to jail).

istrate judge in a jailhouse courtroom" the same day for an "initial appearance hearing," where no prosecutor was present; informed of his rights and the charges against him; and committed to jail. 604 S.E.2d at 510, 512. Moreover, contrary to Gillespie County's contention (Opp. 14) that Georgia law permitted O'Kelley to "waive certain rights and plead guilty" at his initial appearance, the Georgia Supreme Court observed that there were "no issues to resolve" at his appearance other than scheduling court dates and determining O'Kelley's need for court-appointed counsel, and that O'Kelley was "informed that he was *not* to enter a plea." 604 S.E.2d at 510-511 (emphasis added). Yet, because O'Kelley had been confronted by a court with the charges against him and committed to jail, the court concluded that, under *Jackson*, "O'Kelley's Sixth Amendment right to counsel attached at his initial appearance." *Id.* at 512. Significantly, *O'Kelley* expressly overruled the Georgia court's previous holding that an initial appearance at which no prosecutor was present did not trigger the right to counsel—precisely the analysis employed by the Fifth Circuit here—finding it inconsistent with this Court's decision in *Jackson*. *See id.* at 511-512.

Gillespie County argues (Opp. 14-15) that *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), was decided under Iowa law and based on the "significant level of prosecutorial involvement" in the filing of the complaint by a "county attorney." To the contrary, the Iowa Supreme Court observed that "police investigators" (not a "county attorney") "filed a complaint before a magistrate accusing defendant" of murder; explained that although "the record does *not* demonstrate participation by a prosecuting attorney in the proceedings," there was no doubt that "the prosecutorial forces had focused their attention on defendant as a perpetrator" by the time of his initial appearance; and therefore held that the defendant's "sixth and fourteenth amendment" (not Iowa state law) "right to counsel had attached." *Id.* at 422-424. Like *O'Kelley*, *Jackson* thus clearly rejected the Fifth Circuit's prosecutorial involvement analysis.

Finally, Gillespie County asserts (Opp. 15) that the decisions of the courts in New Jersey, Arkansas, and Florida dis-

cussed in the petition (Pet. 16-17) involved "arraignments," but those proceedings, too, did not differ from Rothgery's initial appearance. In *State* v. *Tucker*, 645 A.2d 111 (N.J. 1994), the Supreme Court of New Jersey held that the defendant's Sixth Amendment right to counsel attached when he was arrested, brought before a municipal court judge for an "initial appearance" on a police complaint charging burglary and robbery, and committed to jail. *See id.* at 114-115, 119, 128, 130. Although this "first court appearance" occurred long before indictment and, consistent with standard practice, no prosecutor was present at the hearing, the court held that the defendant's initial appearance was "equivalent" to the "arraignment" in *Jackson*, and that the Sixth Amendment right to counsel had therefore attached. *Id.* at 119, 123, 127; *see also Bradford* v. *State*, 927 S.W.2d 329, 333, 335 (Ark. 1996) (under *Jackson*, "the Sixth Amendment right to counsel had clearly attached" when the defendant was arrested and "appeared" before a magistrate, who "determined that there was probable cause to support the charges against her" and "fixed bond"); *Owen*, 596 So. 2d at 987-989 & nn.4-7 (defendant's Sixth Amendment right to counsel attached at his "first appearance" before a magistrate, at which he was informed of the charges against him and committed to custody).[4] The Fifth Circuit's analysis and result are in sharp conflict with these holdings by state courts of last resort.

II. THE FIFTH CIRCUIT'S ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S SIXTH AMENDMENT PRECEDENT

Gillespie County relies on the same linguistic sleight of hand to argue that the decision below does not conflict with this Court's decisions in *Brewer* and *Jackson*, contending (Opp. 10) that those cases are distinguishable because the defendants were "arraigned." But, in both cases, this Court used the term "arraignment" to refer to the same type of initial court appearance that occurred in Rothgery's case. *See* Pet. 6-7 & nn.1-2; Br. *Amici Curiae* Twenty-Two Professors of Law 6-7; *Owen*,

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[4] Gillespie County makes no attempt to distinguish *State* v. *Barrow*, 359 S.E.2d 844 (W. Va. 1987), which also held that an initial appearance equivalent to that here triggers the right to counsel. *See* Pet. 17.

596 So. 2d at 989 n.7. Thus, in *Brewer*, this Court held that "[t]here can be no doubt ... that judicial proceedings had been initiated" after the defendant had been arrested, "had been arraigned on [the arrest] warrant before a judge," and "had been committed by the court to confinement in jail." *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977). The defendant in *Brewer* had neither been indicted nor asked to enter a plea. Rather, the "arraignment on the warrant" in *Brewer* referred to an initial appearance before a judge at which the defendant was informed of the charges against him and committed to custody (in contrast to an "arraignment on indictment" at which a defendant enters a plea). *See* Pet. 6 n.1. Likewise, in *Jackson*, both defendants were "arraigned" before a magistrate judge one day after arrest and bound over to jail. *Michigan* v. *Jackson*, 475 U.S. 625, 627-628 (1986).[5] The proceedings in *Brewer* and *Jackson* were functionally the same as in Rothgery's case—arrest, initial appearance before a court where the defendant is informed of the charges against him, and commitment to confinement or bail—and in both cases, this Court held that these events "signal[] 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629 & n.3; *see Brewer*, 430 U.S. at 399.[6]

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[5] *See* 1A Gillespie, *Michigan Criminal Law and Procedure* § 16.1 (2007) (under Michigan law, an "arraignment on the warrant" is "the first appearance by the defendant" before a magistrate, at which the defendant is informed of the charges and the right to counsel, and bail may be fixed).

[6] As the petition demonstrated (Pet. 19-21), this Court did not consider it relevant in either case whether a prosecutor was involved in the proceedings. Gillespie County notes (Opp. 10) that the lower court in *Jackson* stated that the "prosecutor's office approved" the complaint leading to arraignment. But this Court never mentioned—much less relied on—any involvement by prosecutors in *Jackson* (or *Brewer*) to reach its holding. To the contrary, *Jackson* made clear that "the Sixth Amendment concerns the confrontation between the State and the individual." 475 U.S. at 634. Where, as here, a defendant stands accused of a crime by a police officer's sworn complaint brought "in the name and by the authority of the State" (Pet. App. 33a), and a court has found probable cause to believe the defendant committed that crime and bound him over to jail (or bail), the defendant is "faced with the prosecutorial forces of organized society," and his Sixth Amendment right to counsel attaches. *Id.* at 631;

Gillespie County also opines (Opp. 7-8) that the Fifth Circuit's decision is consistent with *United States* v. *Gouveia*, 467 U.S. 180 (1984). But in *Gouveia*, unlike here, the defendants—prisoners suspected in another inmate's murder—had not been arrested or brought before a court for an initial appearance on criminal charges. *Id.* at 183-184. They had merely been placed in the prison's administrative segregation unit while the crime was investigated. *Id.* The Ninth Circuit thus acknowledged that "adversary judicial proceedings" had *not* commenced, yet held that the defendants' right to counsel had attached. *Id.* at 185-186. In reversing, this Court simply reaffirmed its long-standing precedent holding that the right to counsel attaches when adversary judicial proceedings are initiated—and not before. *Id.* at 187, 192-193. Because such proceedings *had* commenced here, on facts materially identical to those in *Brewer* and *Jackson*, the Fifth Circuit's holding that Rothgery had no right to counsel cannot be reconciled with this Court's precedent.[7]

III. THE FIFTH CIRCUIT'S "PROSECUTORIAL INVOLVEMENT" TEST THREATENS BASIC SIXTH AMENDMENT VALUES AND WILL PERSIST UNLESS CORRECTED BY THIS COURT

As discussed above, while Gillespie County defends the Fifth Circuit's decision based on the erroneous distinction between Rothgery's initial appearance and an arraignment, the Fifth Circuit did not decide the case on that basis, but instead held that the Sixth Amendment right to counsel does

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see Br. *Amici Curiae* Twenty-Two Professors of Law 8-9 (the Fifth Circuit's "prosecutorial involvement" test "could hardly be less true to the Sixth Amendment's purpose or this Court's precedents").

[7] Gillespie County also asserts (Opp. 4) that no "critical pretrial proceedings" occurred before Rothgery's indictment. The Fifth Circuit expressly declined to reach that issue, noting that Gillespie County had not raised it. Pet. App. 5a n.5. In any event, as *Jackson* made clear, "[t]he question whether arraignment" or a functionally similar proceeding "signals the initiation of adversary judicial proceedings ... is distinct from the question whether the [proceeding] is a critical stage requiring the presence of counsel." 475 U.S. at 629 n.3. Only the former question was addressed by the Fifth Circuit, and only the former is at issue here.

not attach at a defendant's initial appearance unless the defendant can show that a prosecutor was involved. The Fifth Circuit's "prosecutorial involvement" test not only misapprehends this Court's precedent and splits with other lower courts, but threatens core Sixth Amendment values.

Under the Fifth Circuit's rule, a court may commit an indigent defendant arrested without a prosecutor's involvement to jail for long periods without any access to counsel. As *amici* explain, that rule is inconsistent with the history and purposes of the Sixth Amendment, which establish that a defendant's right to counsel attaches when a court restricts his liberty after finding probable cause to believe he has committed a crime. *See* Br. *Amici Curiae* Twenty-Two Professors of Law 3, 9-15. Here, had counsel been appointed after Rothgery's initial appearance, the mistake underlying his arrest would quickly have been uncovered and the charges dismissed. Instead, Rothgery's bail was increased, he was rearrested, and he was wrongfully jailed for a crime he did not commit, because, without the assistance of counsel, "he [did] not know how to establish his innocence." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). That result offends the fundamental principles underpinning the right to counsel.

Moreover, the Fifth Circuit has made clear that it will not alter its holding absent this Court's intervention. As Gillespie County notes (Opp. 8-9), the Fifth Circuit adopted its "prosecutorial involvement" test in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980). Even as other courts have repudiated similar approaches in light of this Court's decision in *Jackson*, *see, e.g.*, *O'Kelley*, 604 S.E.2d at 511-512, the Fifth Circuit has adhered to its misguided rule. Because that rule—the governing law throughout Texas, Louisiana, and Mississippi—seriously undermines the right to counsel for the vast majority of felony defendants who, like Rothgery, cannot afford a lawyer to contest substantial court-imposed deprivations of liberty, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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